Southwest Regional Council of Carpenters and its affiliated Local Union 1780, affiliated with United Brotherhood of Carpenters and Joiners of America *and* Image Exhibit Services, Inc. and Teamsters, Chauffeurs, Warehousemen and Helpers, Local 631, affiliated with International Brotherhood of Teamsters. Case 28–CD–272

October 30, 2009

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

This is a jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act. The charge was filed on November 6, 2008, by Image Exhibit Services, Inc. (Image or Employer), and alleges that the Respondent, Southwest Regional Council of Carpenters and its affiliated Local Union 1780, affiliated with United Brotherhood of Carpenters and Joiners of America (Carpenters), violated Section 8(b)(4)(D) of the Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by Teamsters, Chauffeurs, Warehousemen and Helpers, Local 631, affiliated with International Brotherhood of Teamsters (Teamsters or Local 631). The hearing was held on December 2, 2008, before Hearing Officer John T. Giannopoulos.

The National Labor Relations Board[1] affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The Employer, a Nevada corporation with an office and place of business in Las Vegas, Nevada, is engaged as a contractor in the convention and trade show industry. The parties stipulated that during the 12-month period preceding the hearing, Image, in conducting its operations, purchased and received goods and materials at its Las Vegas, Nevada facility valued in excess of $50,000 directly from points outside the State of Nevada. We accordingly find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act. We further find, based on the stipulation of the parties, that Carpenters and Teamsters are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of Dispute

Image is 1 of over 130 employers that install and dismantle trade show exhibits (I & D work) at shows and conventions in Las Vegas. The majority of the I & D work is governed by a Master Agreement signed by Teamsters and GES Exposition Services, Inc., a large general contractor in the industry. Under the Master Agreement, GES agreed to use Local 631 employees for its exhibits and shows. In October 1997, Image signed a Short Form Agreement with Local 631 making it subject to the provisions of the Master Agreement. Image was not a signatory to the Master Agreement. The term of the Master Agreement at issue here was June 1, 2004, through May 31, 2007, and the term of the Short Form Agreement between Image and Teamsters was coextensive with the Master Agreement's term. In 2007, Teamsters and GES negotiated a successor contract with a term from June 1, 2007, to May 31, 2011.

Article 4.4 of the Master Agreement provides that if Teamsters cannot supply enough employees to meet an employer's specific needs the employer can seek employees from another source. Pursuant to article 4.4, Image entered into a secondary agreement with Carpenters from August 1, 2004, to July 31, 2007. From 2004 through 2007, Image performed work in 40 to 50 shows per year in Las Vegas. During that period, it used Carpenters-represented employees to perform work on approximately half of its shows because Teamsters was unable to provide employees.

The relevant Master Agreement included an automatic 1-year renewal provision unless either party provided written notice, at least 60 days before the May 31, 2007 expiration date, of its desire to terminate or modify the agreement. The Short Form Agreement continued in

[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009), petition for cert. filed 78 U.S.L.W. 3130 (U.S. September 11, 2009) (No. 09-328); *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009), petition for cert. filed 77 U.S.L.W. 3670 (U.S. May 22, 2009) (No. 08-1457); *Northeastern Land Services v. NLRB*, 560 F.3d 36 (1st Cir. 2009), petition for cert. filed 78 U.S.L.W. 3098 (U.S. August 18, 2009) (No. 09-213). But see *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), petition for cert. filed sub nom. *NLRB v. Laurel Baye Healthcare of Lake Lanier, Inc.*, __U.S.L.W.__ (U.S. September 29, 2009)(No. 09-377).

effect for the full term of the Master Agreement and all successive agreements, except where either party gave notice, from 120 days to 90 days before the expiration of the Master Agreement, of its intention to terminate the Short Form Agreement. Finally, the Master Agreement requires that an employer using Teamsters-represented employees obtain a $60,000 surety bond.

Because of some undisclosed problems with the IRS, Image was not able to secure a $60,000 bond and was essentially "not bondable." Until November 2006, Image continued to use Teamsters-represented employees as required by the Master Agreement, and although Image had several discussions with Teamsters about the bond, the parties were never able to resolve the issue. On those occasions when Image used Carpenters-represented employees on its jobs, Image Vice President Anthony McKeighan testified that he found Carpenters employees to be more efficient and more skilled than Teamsters employees, and thus Image preferred using Carpenters. On March 28, 2007, 64 days before the May 31, 2007 expiration of the Master Agreement (and the Short Form Agreement), Image sent Teamsters written notice, by certified mail, of its desire to renegotiate or terminate their Short Form Agreement.

Image received no response from Teamsters to its notice to terminate or renegotiate. In addition, Image alleges that during the following months, various Teamsters agents indicated to the Employer that the contractual relationship between the parties was over. Specifically, Image President Scott Loveland testified that in October 2006, Teamsters Business Agent Mike Goodall told him that if Image did not obtain a surety bond, Teamsters would not provide him with labor after January 1, 2007.[2] McKeighan testified that in August 2007, Teamsters Assistant Business Agent Laura Simms complained to him because she observed a job where Image was using Carpenters employees instead of Teamsters employees. Simms allegedly called the Teamsters' union hall and then reported to McKeighan that Image was no longer a signatory to an agreement with Teamsters and thus Teamsters had no claim to the work. Moreover, although Teamsters challenged the Employer on other occasions for using Carpenters instead of Teamsters, Teamsters did not pursue a grievance or other legal action against the Employer for failing to use Teamsters on its jobs or for breaching the Short Form Agreement.

On September 19, 2007, Image notified Teamsters and the Teamsters Pension Trust that, according to Teamsters, Image was no longer signatory to an agreement with Teamsters, and thus Image would no longer make contributions to the trust. In response, the Teamsters Trust requested information to determine withdrawal liability. On September 28, 2007, Image entered into a primary agreement with Carpenters, effective September 1, 2007, to August 31, 2011, for all I & D work in Las Vegas. Thereafter, Image used only Carpenters on its jobs.

In November 2007, Teamsters filed a grievance against Image for its failure to obtain a surety bond. In response, Loveland stated that according to several Teamsters agents Image no longer had a binding agreement with Teamsters. Local 631 President Tommy Blitsch replied to Loveland by denying that the Short Form Agreement was terminated, and he stated that no Teamsters representative had the power to terminate the agreement. In addition, he stated that Image had been invited with other signatory contractors to negotiate for a successor contract, and because Image did not participate, Teamsters believed that Image had accepted and was bound to the successor agreement.

On May 22, 2008, the Teamsters Union Security Fund filed a suit against Image in Federal district court seeking an audit and unpaid benefit contributions. In October 2008, due to the cost of the Federal court litigation, Loveland called Carpenters Business Agent William Harris and informed him that Image was considering going back to Teamsters for future I & D work. On October 22, 2008, Carpenters responded by letter, stating that it would resort to strikes and picketing if Image transferred the I & D work to Teamsters. On November 6, 2008, Image filed a charge against Carpenters alleging that Carpenters violated Section 8(b)(4)(D) by its actions.

B. The Work in Dispute

The work in dispute concerns the assignment of installation and dismantling of trade show exhibits in the Las Vegas convention industry involving the Employer.

C. Contentions of the Parties

The Employer contends that it terminated its bargaining relationship with Teamsters, and it now has a binding primary contract with Carpenters for the work in dispute. The Employer contends that Teamsters has no valid claim to the work. The Employer further claims that, even if its termination notice to Teamsters was untimely under the terms of the Short Form Agreement, Teamsters, through various actions and statements, acquiesced in the termination of the collective-bargaining relationship and thereby waived a timeliness argument. The Employer states that there is no agreed-upon method of resolving jurisdictional disputes that binds all three par-

[2] Cheryl Schmit, Teamsters' office manager and dispatcher, testified that Image did not request Teamsters employees after November 2006. There was no evidence that Teamsters ever refused to send employees to Image.

ties. It argues that the work in dispute should be assigned to employees represented by Carpenters based on the factors of collective-bargaining agreements, employer preference, current assignment, relative skills, and economy and efficiency of operations. Carpenters essentially adopts the Employer's position, and its arguments mirror the Employer's.

Teamsters contends that the Employer's 64-day termination notice was untimely, and the Employer is thus bound to the most recent Master Agreement and Short Form Agreement, both of which run through 2011. Teamsters further asserts that none of its business agents had the authority, through their words or actions, to terminate the collective-bargaining relationship between the parties. It thus claims that, based on the longstanding, primary contractual relationship between Teamsters and the Employer, the work in dispute belongs to Teamsters. In addition, it argues that the factors of efficiency and economy of operations, relative skills, area and industry practice, and the Employer's preference over the past 10years all weigh in favor of Teamsters-represented employees.

D. Applicability of the Statute

In determining whether a jurisdictional dispute within the scope of Section 10(k) of the Act exists, the Board first determines whether there is reasonable cause to believe that Section 8(b)(4)(D) has been violated.[3] This requires finding reasonable cause to believe that a union has used proscribed means to enforce its claim to the work in dispute, that there are competing claims to the disputed work between rival groups of employees, and that the parties have not agreed on a method of voluntary adjustment of the dispute. See, e.g., *Shepard Exposition Services,* 337 NLRB at 723.

These jurisdictional prerequisites have been met in this case. Both Teamsters and Carpenters claim the work in dispute. Carpenters threatened that it would strike and picket Image if it assigned the disputed work to employees represented by Teamsters. Finally, there is no agreed-upon method for voluntarily resolving the dispute that is binding on all parties to the proceeding.

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J.A. Jones Construction),* 135 NLRB 1402, 1410–1411 (1962); *Shepard Exposition Service*, supra at 723–724. The following factors are relevant in resolving this dispute.

1. Certifications and collective-bargaining agreements

The parties stipulated, and we find, that there are no Board certifications affecting this dispute.

Teamsters contends that the Master Agreement between GES and Teamsters covers the work in dispute, and through Teamsters' Short Form Agreement with Image, it has always had first claim to Image's I & D work. On the other hand, Image and Carpenters argue that the Short Form Agreement between Image and Teamsters was terminated, and thus, as of 2007, Teamsters had no contractual right to the work. As to Carpenters, there is no dispute that it had a primary contract with the Employer covering the disputed work.

Image has not shown that the Short Form Agreement, and thus its obligation to assign the disputed work to Teamsters-represented employees, was terminated. It is undisputed that Image's operative window for notifying Teamsters of its intent to modify or terminate the contract was 120 to 90 days before the expiration of the Master Agreement, as clearly stated in the Short Form Agreement. It is also clear that Image's March 28, 2007 letter, received 64 days before the agreement's expiration, was untimely. Indeed, Image Vice President McKeighan admitted that he made a mistake by relying on the 60-day notification window in the Master Agreement rather than the 120 to 90-day window in the Short Form Agreement.

Image argues, however, that Teamsters, by certain conduct, waived its claim of untimely notice to terminate or modify the contract. We disagree. Image relies on *Industrial Workers Local 770 (Hutco Equipment)*, 285 NLRB 651 (1987), and *Hasset Maintenance Corp.,* 260 NLRB 1211 (1982), for the proposition that a party, by

[3] The Board also looks to the "real nature and origin of the dispute" in determining whether a jurisdictional dispute exists. *Teamsters Local 578 (USCP-Wesco*), 280 NLRB 818, 820 (1986), affd. sub nom. *USCP-Wesco, Inc. v. NLRB*, 827 F.2d 581 (9th Cir. 1987). In making that determination, the Board has held that if a dispute is fundamentally over the preservation, for one group of employees, of work they have historically performed, it is not a jurisdictional dispute. Although none of the parties in this case argued work preservation, the Board initially questioned whether the facts presented a work preservation claim rather than a jurisdictional dispute. On May 13, 2009, the Board issued a notice to the parties requesting supplemental briefing on the issue. Having reviewed the parties' submissions and extant Board precedent, we conclude that a jurisdictional dispute exists. In *Stage Employees IATSE Local 39 (Shepard Exposition Service)*, 337 NLRB 721 (2002), on facts very similar to those presented in this case, the Board rejected one party's work preservation claim and decided the case by weighing jurisdictional dispute factors. We find that *Shepard Exposition* is controlling precedent for resolving this case.

conduct, can waive a claim of untimely notice to terminate or renegotiate a contract. But as the Seventh Circuit has pointed out, these cases apply where the alleged waiver conduct occurred *before* the contract renewed or was reaffirmed.[4] In this case, the conduct cited by Image occurred *after* the successor Master Agreement was signed on July 16, 2007. At that point, Image was bound to the new agreement, and subsequent conduct by Teamsters could not retroactively waive Teamsters' claim that Image's request to renegotiate or terminate was untimely. *Contempo Design, Inc. v. Carpenters Northeast Illinois District Council*, supra at 547.

Further, we do not find that Teamsters' conduct was sufficiently clear to show that it believed the agreement was terminated. Goodall's alleged statement to McKeighan in October 2006—that Teamsters would not supply Image with employees after January 1, 2007, unless it acquired a surety bond—does not show Teamsters' clear intention to terminate the agreement. Rather, it shows Teamsters' concern over the bond issue, which Teamsters and Image discussed and worked around on several other occasions. In addition, the record shows that Teamsters never refused to supply Image with workers. Rather, Image stopped calling Teamsters' union hall for employees in November 2006.

Image further relies on Laura Simms' alleged statement to McKeighan in August 2007 that Teamsters no longer had a contract with Image. We do not find under these circumstances that an oral statement by an assistant business agent would be sufficient, without more, to rescind or revoke a written contract.

Moreover, certain conduct by Teamsters and Image indicate that neither party considered the Short Form Agreement terminated. Teamsters filed a grievance in November 2007 regarding Image's failure to attain a surety bond as required under the Master Agreement. Local 631 President Blitsch, in his November 19, 2007 letter to Image, stated in no uncertain terms that Image was subject to the successor Master Agreement. Further, McKeighan testified that Image continued to employ two Teamsters-represented employees (although not out of the hiring hall) through August 2007, and Image continued to pay into the Teamsters Trust on their behalf. This conduct suggests adherence by both parties to an existing contract.

Therefore, we find that both Teamsters and Carpenters had valid collective-bargaining agreements with Image and valid claims to the work in dispute pursuant to those contracts. In such cases, the Board finds that this factor does not favor either union in a jurisdictional dispute. *Shepard Exposition Services,* 337 NLRB at 724.

2. Employer preference and current assignment

The evidence clearly establishes that Image has assigned the work in dispute to Carpenters-represented employees since November 2006. In addition, McKeighan testified that Image preferred Carpenters employees for this work. The Board has traditionally assigned significant weight to the employer's preference. See, e.g., *Graphic Communications Workers Local 508M (Jos. Berning Printing Co.)*, 331 NLRB 846, 848 (2000) (employer preference given "considerable weight"). Thus, employer preference and current assignment weigh significantly in favor of Carpenters-represented employees.

3. Employer's past practice

Under the Short Form Agreement, the Employer traditionally awarded the disputed work to Teamsters employees first, and only when Teamsters employees were not available did Image employ Carpenters employees. According to McKeighan, from 2004 to 2007, Image averaged about 40 to 50 shows per year, and it used Carpenters for about half of those shows. Based on this testimony, the past practice has been to distribute the work fairly equally to employees of both unions. Thus, this factor does not appear to favor either union**.**

4. Industry and area practice

According to testimony from various witnesses, Teamsters performs the majority of I & D work in Las Vegas. Local 631 Secretary-Treasurer King estimated that Teamsters performs about 90 percent of the work. Thus, this factor favors Teamsters-represented employees.

5. Relative skills

McKeighan testified that he found Carpenters employees better prepared and better trained in the field. They generally showed up with the proper tools, and they could take a set of blueprints and install the job without supervision. According to McKeighan, this was not usually the case with Teamsters employees. This testimony was supported by Teamsters Business Agent Terry Schartung, who testified that as a result of 2007 negotiations with GES, Teamsters created a "skilled labor board" because "one of the biggest concerns we had heard from I & D houses is that they were having difficulty getting competent, skilled and qualified labor to set their booths." Based on this evidence, we find that this factor favors Carpenters-represented employees.

[4] *Contempo Design, Inc. v. Carpenters Northeast Illinois District Council,* 226 F.3d 535 (7th Cir. 2000).

6. Economy and efficiency of operations

McKeighan testified that because of Carpenters employees' greater skill and experience, they were able to work more efficiently and with less supervision than Teamsters employees. As a result, Image was able to expand its operation and take on more jobs in 2008 using Carpenters exclusively.

In addition, because Teamsters dominated the industry, it ran out of laborers during busy times, forcing employers to contact secondary labor sources. As indicated above, McKeighan testified that from 2004 to 2007, when Image was still abiding by the Master Agreement, it used Carpenters employees on half of its jobs, indicating that no Teamsters employees were available for those jobs. On the other hand, there was no evidence that Carpenters has ever run out of laborers or denied Image's requests for employees. Thus, Carpenters has been more efficient and consistent in providing Image with employees.

For these reasons, we find that this factor favors awarding the work to Carpenters-represented employees.

Conclusions

After considering all the relevant factors, we conclude that employees represented by Carpenters are entitled to perform the work in dispute. We reach this conclusion relying on the factors of employer preference and current assignment, relative skills, and economy and efficiency of operations. In making this determination, we are awarding the disputed work to employees represented by Southwest Regional Council of Carpenters and its afiliated Local Union 1780, afiliated with United Brotherhood of Carpenters and Joiners of America, not to that union or to its members.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

Employees represented by Southwest Regional Council of Carpenters and its affiliated Local Union 1780, afiliated with United Brotherhood of Carpenters and Joiners of America are entitled to perform all installation and dismantling of trade show exhibits in the Las Vegas convention industry involving the Employer, Image Exhibit Services, Inc.

Dated, Washington, D.C. October 30, 2009

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD